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No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA EX REL.
L. B. BINION, PETITIONER
v.
UNITED STATES MARSHAL FOR THE
DISTRICT OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 11–24) is reported at 188 F. Supp. 905. The opinion of the court of appeals (R. 101–107) is reported at 292 F. 2d 494.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1961, and a petition for rehearing was denied on August 4, 1961. The petition for a writ of certiorari was filed on September 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals was required to decide an issue, in a habeas corpus proceeding, which, even if petitioner was correct, would not entitle him to release.

2. Whether petitioner is entitled to credit on his prison sentence for a period during which he was completely free from custody, and not even on bail, as a result of an order in his favor in a habeas corpus proceeding which he himself brought.

3. Whether petitioner is entitled to credit on a prison sentence, as well as a separate probation sentence, for a period of time when he was on probation and not in prison.

4. Whether petitioner is entitled to credit on his prison sentence for time when he was not in custody because of allegedly unjustified delay by the government in filing the record and its brief and in taking petitioner into custody.

STATEMENT

The pertinent facts are set out in the memorandum opinion of the district court (R. 12–15):

On September 3, 1952, petitioner entered a plea of nolo contendere in the District Court for the District of Nevada to an indictment charging income tax evasion for the year 1949, in violation of 26 U.S.C. 145(b). He was sentenced to pay a fine of $15,000; imposition of a prison sentence was suspended, and he was placed on probation for five years.

On December 14, 1953, in the District Court for the Western District of Texas, petitioner entered a plea

of guilty to two indictments charging income tax evasion for the years of 1947 and 1948. The court sentenced him to three concurrent terms of five years each, to be followed by probation for three years, and imposed a fine of $20,000. Service of the sentences commenced on December 14, 1953.

In August 1956, petitioner filed a motion under 28 U.S.C. 2255 to correct the Texas sentences, alleging that they were excessive. This motion was denied and an appeal was taken to the Court of Appeals for the Fifth Circuit. At that time *Achilli* v. *United States,* 353 U.S. 373, involving the same question, was pending before this Court, and the court of appeals entered an order deferring determination of petitioner's case pending a decision by this Court in the *Achilli* case. On March 11, 1957, this Court granted petitioner's release on bail pending the *Achilli* decision, and on March 19, 1959, petitioner was released on $25,000 cash bond by the District Court for the Western District of Texas. On that date there remained three months and twenty-seven days to be served on the Texas sentences prior to eligibility for mandatory release under the provisions of 18 U.S.C. 4164. Petitioner had previously been denied parole. On May 27, 1957, this Court decided the *Achilli* case adversely to petitioner's contention, and on June 28, 1957, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of petitioner's motion to correct sentence. *Binion* v. *United States,* 245 F. 2d 466. On October 14, 1957, this Court denied certiorari. 355 U.S. 834.

On October 16, 1957, petitioner surrendered to the United States Marshal at Philadelphia, Pennsylvania, although he resided and had previously been under supervision in Las Vegas, Nevada. On the same day, he filed a petition for a writ of habeas corpus in the Eastern District of Pennsylvania, and applied for release on bail pending hearing on the petition. The court authorized his release on $5,000 bail on the same day and issued a rule to show cause why the writ should not be granted. On November 3, 1958, the case was called for hearing and was submitted on briefs. Sixteen exhibits and a stipulation signed only by the relator's counsel were admitted into evidence. No witnesses were called by either side.

The evidence showed the following:[1] Under the five-year period of probation granted by the district court in Nevada on September 3, 1952, petitioner was directed to, and did, report to the United States Probation Officer for that district once every sixty days prior to commencement of his Texas sentence. Upon his release on bail from the United States Penitentiary at Leavenworth on March 19, 1957, he again began reporting to his probation officer who instructed him to report once a week, a request with which petitioner complied. On September 3, 1957, the five-year probation period terminated, and on September 13, 1957, an order to that effect was signed by the court. The probation officer nevertheless instructed Binion to continue reporting weekly pending clarification of

[1] The evidence adduced at this hearing and that adduced at the hearing of August 15, 1960, *infra*, p. 7, are practically identical.

his status.[2] On September 19, 1957, the probation officer wrote to the United States Board of Parole stating that petitioner was continuing to report to him and requesting information as to his status. The Board of Parole replied on October 21, 1957, advising that petitioner was not reporting pursuant to any order or request by the Board; that he was not in the custody of the Attorney General while free on bail; and that, consequently, there was no requirement by the Board that he report to the probation officer. The latter so advised petitioner on October 23, 1957, and petitioner did not report thereafter.

Upon this evidence, the District Court for the Eastern District of Pennsylvania found that petitioner had reported to the probation officer in the same manner as one under parole supervision,[3] and that while petitioner was not on "parole de jure, he was so de facto and bound to conduct himself accordingly" (Pet. 24a). Since petitioner had reported for a period greater than the the time remaining to be served in physical custody under the Texas sentence,

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[2] It should be noted, however, that during the seven-month period between March 19, 1957, and October 23, 1957, petitioner was away from the District of Nevada on six separate occasions including trips to Philadelphia, Pennsylvania, Mecca, California, and Jordan, Montana. On one absence he stayed at his ranch in Montana for a period of two and one-half months and made contact with the probation officer by telephone.

[3] After the original petition for a writ of habeas corpus was filed, the probation officer wrote to petitioner's attorney, stating that petitioner reported prior to October 23, 1957, in the same manner as he "would require a parolee or [conditional releasee] to report for supervision" (R. 75; but see R. 44).

the court concluded that service of the confinement portion of petitioner's sentence had been completed and that he was entitled to be released. On December 22, 1958, an order was signed discharging petitioner from custody. On February 19, 1959, the government filed a notice of appeal (R. 49).

On December 9, 1959, the Court of Appeals for the Third Circuit reversed the order of the district court, holding that petitioner was not entitled to credit for the period he was on probation, *i.e.*, from March 19 to September 3, 1957. It concluded, however, that he was entitled to credit for the period from the latter date to October 23, 1957. *United States ex rel. Binion* v. *O'Brien,* 273 F. 2d 495. Petitioner petitioned for a rehearing, but this was denied. Certiorari was likewise denied, on June 6, 1960. 363 U.S. 812.

On June 10, 1960, petitioner attempted to surrender to the Deputy United States Marshal at Las Vegas, Nevada, but the Marshal refused to take him into custody.[4] On June 13, 1960, the Court of Appeals for the Third Circuit issued its mandate, and on

[4] Mr. Harry E. Claiborne, petitioner's attorney at Las Vegas, testified at the hearing on August 15, 1960, in the District of Nevada (see *infra*, p. 7) that when he brought petitioner to Deputy Marshal Sampson on June 10, 1960, Mr. Sampson stated that he did not know what to do with petitioner, but that shortly afterward the Deputy Marshal stated that the United States Attorney advised him not to hold petitioner (R. 40). Deputy Marshal Sampson testified that Mr. Claiborne appeared with petitioner on June 10, 1960, and advised that he was surrendering petitioner (R. 60); that the attorney remained about ten or fifteen minutes; that he, Sampson, talked with the United States Attorney in his office in the presence of both petitioner and his attorney; that he advised

July 5, 1960, the District Court for the Eastern District of Pennsylvania ordered petitioner remanded to the custody of the Attorney General. On July 12, 1960, petitioner was taken into custody, but he was immediately released on a writ of habeas corpus issued by the District Court for the District of Nevada and admitted to bail (R. 12).

On August 15, 1960, a hearing was held in the District of Nevada to determine the validity of petitioner's detention. At that time the same exhibits which were in evidence in the District Court for the Eastern District of Pennsylvania and were before the Court of Appeals for the Third Circuit on petitioner's prior appeal were again introduced into evidence (R. 47–49). In addition, Chief Probation Officer Hubert A. Boyd testified that petitioner "reported to my office * * * as a probationer" and that he (Boyd) had talked with the sentencing judge who suggested that he handle "this case on probation in the same manner as * * * any case here in Nevada" (R. 44).

On November 9, 1960, the district court ordered the writ of habeas corpus discharged and petitioner remanded to the custody of the Marshal. Petitioner immediately filed a notice of appeal and was released on bail. The court of appeals affirmed.[5]

ARGUMENT

1. Petitioner contends (Pet. 14–15, 19–21) that the Court of Appeals for the Ninth Circuit in this case erred in refusing to consider whether he was entitled

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Mr. Claiborne he would not accept custody of petitioner; and that he in no way restrained petitioner's movements or liberty (R. 81, 83).

[5] Petitioner has continued on bail.

to credit on his prison sentence for the time he continued to report to the probation officer after his probation period had expired (September 3, 1957, to October 23, 1957). He contends that this refusal is in conflict with a decision of the Court of Appeals for the Third Circuit on another phase of this litigation. The Court of Appeals for the Third Circuit had stated that "Binion is entitled to credit on his Texas sentence * * * for that period during which he was required to report following expiration of his Nevada sentence of probation, since his status then was solely that of one released on bail" (Pet. App. 19a). The Court of Appeals for the Ninth Circuit, on that issue, held (Pet. App. 7a):

> Inasmuch as even under appellant's calculation there were 110 days left to be served upon his Texas sentence when he was released on bail, he would not now be entitled to be released even if he should be given credit for this 50 days upon his sentence. At this time we express neither approval nor disapproval of the holding of the Third Circuit that appellant was entitled to this 50 days credit.

We submit that the Ninth Circuit's decision was correct and is not in conflict with that of the Third Circuit. First, the Ninth Circuit could not have erred on the merits of petitioner's claim or decided it in conflict with the Third Circuit, since the Ninth Circuit did not decide the claim.

Second, as to whether the Ninth Circuit properly refused to decide the issue, petitioner would not be entitled to release from custody even if petitioner were

entitled to the fifty days' credit for which the Third Circuit thought he should receive credit. It is well settled that an action for habeas corpus will not lie unless it results in immediate release. *McNally* v. *Hill,* 293 U.S. 131. The decision of the Third Circuit is not in conflict, for it did not hold that the court was *required* to decide the issue even though petitioner was not entitled to release; the most it did, and this only by implication,[6] was to say that the court was authorized to decide the issue. The fact that the Ninth Circuit refused to decide the issue despite its authority to do so (we assume this authority only *arguendo*) does not conflict with the Third Circuit's decision.

2. Petitioner also urges (Pet. 15–19) that he is entitled to credit on his prison sentence for the fifty-eight days between his full release from custody by the District Court for the Eastern District of Pennsylvania and the date the government filed a notice of appeal (December 22, 1958, to February 19, 1959).[7] Petitioner

[6] As the District Court for the District of Nevada held (R. 19–20, 22), we believe that the Court of Appeals for the Third Circuit was not authorized to determine the issue, and therefore that court's statements were dictum. There is nothing in the Third Circuit's opinion indicating whether or not it was purporting actually to decide the issue.

[7] Petitioner claims (Pet. 15–16) that the decision below rejecting this claim is in conflict with that of the Court of Appeals for the District of Columbia in *Harris* v. *Lang*, 27 App. D.C. 84 (1906). In the *Harris* case the court of appeals did not order reversal of what it considered to be an erroneous decision of the Supreme Court of the District of Columbia in favor of the prisoner on the merits in a habeas corpus case because, it stated, the prisoner's term of imprisonment had expired during the appeal. This determination was apparently

raised the same point in his petition for rehearing in the Third Circuit but was unsuccessful there, and he did not then raise it in his petition for certiorari in this Court.

It is well established that mere lapse of time without imprisonment or other restraint contemplated by law does not constitute service of sentence. *Anderson* v. *Corall,* 263 U.S. 193; *Patterson* v. *Jones,* 141 F. 2d 319 (C.A. 9); *Hunter* v. *McDonald,* 159 F. 2d 861 (C.A. 10), certiorari denied, 331 U.S. 853. See also *Morgan* v. *Ward,* 248 Fed. 691 (C.A. 8). If petitioner's contentions were correct, however, he would receive credit for a period of time when he was neither in prison nor on bail. To award him such credit would clearly contradict Rule 38(a)(2) of the Federal Rules of Criminal Procedure which, pending an appeal, prevents even a prisoner on bail from receiving credit on his sentence.[8] Moreover, his freedom from custody—

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based on the implicit assumption that the sentence continued to run even though the prisoner was not in custody (whether on bail is not shown). The court of appeals held that, even if the lower court had been right on the merits, its release of the prisoner was premature. Here, in contrast, if the District Court for the Eastern District of Pennsylvania had been correct in crediting the probation period, petitioner was entitled to release.

The other decisions on which petitioner relies (Pet. 16–17) involve the erroneous release of prisoners by the government itself. These decisions have held that a prison sentence continues to run in those circumstances. Here, however, petitioner himself sought release by bringing a habeas corpus proceeding. Petitioner should not get the benefit of an erroneous judicial determination caused by his own efforts.

[8] Rule 38(a)(2) provides: "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail."

which interrupted the running of his sentence—was the result of a decision favorable to petitioner in a habeas corpus proceeding which he himself brought.

Even assuming that petitioner would be entitled to receive credit as time spent in confinement for this period, the fifty-day credit to which the Court of Appeals for the Third Circuit said petitioner was entitled would have to be deducted from the fifty-eight days claimed here, leaving only eight days' credit, if any, in controversy. As a result, petitioner would not now be entitled to release even if his arguments on this issue are correct.

3. Petitioner also argues again (Pet. 21–25) the issue whether he is entitled to credit on his prison sentence, in addition to the credit he received on his probation sentence, for the time between when he was released on bail pending the decision in *Achilli* v. *United States, supra,* and when his probation expired while he was free on bail (March 19, 1957, to September 3, 1957). This question was decided contrary to petitioner's contention in *United States ex rel. Binion* v. *O'Brien,* 273 F. 2d 495 (C.A. 3), certiorari denied, 363 U.S. 812,* and the district court and the court

*The Court of Appeals for the Third Circuit stated (Pet. App. 17a): "Initially, we must consider Binion's status when placed on bail by the Supreme Court. We cannot agree with the district court that Binion, when enlarged on bond, was under no restraint other than the usual limitations of one so freed. On the contrary, Binion at that time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted. It is true that, while incarcerated, he was not required to affirmatively report, for in fact he could not do so. However, upon release, the terms of his

of appeals in this litigation reconsidered and agreed with that decision (R. 20–21; Pet. App. 7a). While *res judicata* is not applicable in habeas corpus proceedings, this Court has stated in *Salinger* v. *Loisel,* 265 U.S. 224, 230–231, that a federal court may base its refusal to discharge on a prior refusal, since repeated adjudications of the same issue should be avoided. See *Darr* v. *Burford,* 339 U.S. 200, 215; *Cruz-Sanchez* v. *Robinson,* 249 F. 2d 771, 774 (C.A. 9); *Swihart* v. *Johnston, Warden,* 150 F. 2d 721, 723 (C.A. 9), certiorari denied, 327 U.S. 789; *Broadus-Bey* v. *Diamond,* 264 F. 2d 242 (C.A. 6).

4. Petitioner suggests (Pet. 25) that his release is "additionally appropriate because the record reflects unjustifiable delay * * * on the part of the Government amounting to some 90 days." First, petitioner alleges that there was a "delay" of fifty-eight days in filing the record and brief on appeal in the Third Circuit. This issue, however, was not raised before the Court of Appeals for the Third Circuit, nor was it even mentioned in the district court or the court of appeals in this case. Consequently, it is not properly before this Court now. In

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probation became operative, and he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence. In essence, Binion desires double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer. Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date."

addition, petitioner suggests no justification for translating this delay into a credit on his prison sentence despite the fact he was not in custody. Indeed, his claim is directly inconsistent with Rule 38(a)(2), F.R. Crim. P.

Second, petitioner includes in the ninety-day period of "unjustifiable delay" a period of thirty-two days (while he was free following the decision of the District Court for the Eastern District of Pennsylvania in his behalf) from June 10, 1960, when he unsuccessfully attempted to surrender himself into custody, and July 12, 1960, when he was actually taken into custody after the Third Circuit had decided against him. The United States Marshal in Nevada to whom petitioner attempted to surrender refused to accept petitioner into custody in the absence of a court order, and the District Court for the District of Nevada did not enter its order authorizing and directing the Marshal to take petitioner into custody until July 5, 1960. The action of the Marshal, in awaiting a court order, was, of course, entirely proper. Moreover, petitioner was not prejudiced by the Marshal's refusal, since it is apparent that he was attempting to surrender solely to establish a basis for an immediate petition for a writ of habeas corpus and application for bail in the District Court for the District of Nevada. This is exactly what he did as soon as he was taken into custody on July 12, 1960, and he was immediately released on bail.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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